

APPEAL NO. 022319
FILED OCTOBER 31, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 15, 2002. The hearing officer determined that (1) the respondent/cross-appellant (claimant) sustained a compensable injury on _____; (2) the claimant had disability from November 13, 2001, through March 10, 2002; and (3) the appellant/cross-respondent (carrier) did not waive the right to contest the claimed injury by not contesting the injury in accordance with Section 409.021. The carrier appeals the injury and disability determinations on sufficiency grounds. The claimant cross-appeals the hearing officer's waiver determination on legal grounds. The carrier responds that it did not waive the right to dispute compensability, citing Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.).

DECISION

Affirmed in part, reversed and rendered in part.

INJURY AND DISABILITY

We first address the carrier's assertion that the hearing officer erred in admitting Claimant's Exhibit No. 4 and Claimant's Exhibit No. 5, pages 4-5. To obtain a reversal on these grounds, the carrier must show that not only was the admission of the documents error but that the error was reasonably calculated to cause and probably did cause the rendition of an improper decision. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). Upon review of the record, we do not find that to be so in this case.

The hearing officer did not err in determining that the claimant sustained a compensable injury on _____, and had disability from November 13, 2001, through March 10, 2002. The determinations involved questions of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, we cannot conclude that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

CARRIER WAIVER

The hearing officer erred in determining that the carrier did not waive the right to contest the claimed injury under Section 409.021. At the time of the hearing, the Texas

Workers' Compensation Commission (Commission) determined that the decision in Continental Casualty Co. v. Downs, 81 S.W.3d 803 (Tex. 2002), which held that a carrier must adhere to a seven-day "pay or dispute" requirement, would not be followed until the motion for rehearing process before the Texas Supreme Court had been exhausted. See TWCC Advisory No. 2002-08 (June 17, 2002). On August 30, 2002, the Texas Supreme Court denied the motion for rehearing, and, as such, the Downs decision, along with the requirement to adhere to the seven-day "pay or dispute" provision, became final. Texas Workers' Compensation Commission Appeal No. 021944-s, decided September 11, 2002. It is undisputed that the carrier neither initiated the payment of benefits nor denied the claim within seven days after receiving written notice of the claimant's injury in this case. Accordingly, we reverse the hearing officer's determination and render a new decision that the carrier waived its right to contest compensability of the claimant's injury.

As indicated above, the carrier argues that its failure to timely dispute the claimed injury was not a waiver, citing Williamson, *supra*. We have previously recognized that Williamson is limited to situations where a claimant did not have an injury. In this case, the evidence shows, and the hearing officer determined, that the claimant did have an injury to his right knee. Accordingly, Williamson cannot be relied upon to support the determination that the carrier did not waive its right to contest compensability of the injury.

The decision and order of the hearing officer are reversed with regard to the waiver determination and a new decision rendered that the carrier waived its right to contest compensability of the injury. Because the carrier waived its right to contest compensability, the claimant's injury of _____, is compensable as a matter of law. The decision and order of the hearing officer are affirmed with regard to the injury and disability determinations.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**GARY SUDOL, CLAIMS MANAGER
ZURICH U.S.
9330 LBJ FREEWAY, SUITE 1200
DALLAS, TEXAS 75243.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Michael B. McShane
Appeals Judge